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IN THE SUPREME COURT OF THE UNITED STATES

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HENRY MONTGOMERY, :  
Petitioner : No. 14-280

v. :

LOUISIANA. :

- - - - - x

Washington, D.C.  
Tuesday, October 13, 2015

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:05 a.m.

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case 14-280, Montgomery v.  
5 Louisiana.

6 Mr. Bernstein.

7 ORAL ARGUMENT OF RICHARD D. BERNSTEIN

8 ON BEHALF OF THE COURT-APPOINTED AMICUS CURIAE

9 MR. BERNSTEIN: Mr. Chief Justice, and may  
10 it please the Court:

11 The issue is whether to decide the question  
12 of Miller's retroactivity in this case or in a Federal  
13 habeas case such as Johnson v. Manis, No. 15-1 on this  
14 Court's docket.

15 In today's case there is no jurisdiction  
16 over that question because the point of Section 1257 is  
17 to enforce the Supremacy Clause. And the Supremacy  
18 Clause states that when, quote, "the laws of the  
19 United States," unquote, apply, quote, "the judges" --  
20 and this is -- these are the key words -- "in every  
21 State shall be bound thereby."

22 There is no such thing as supreme Federal  
23 law that depends on whether a particular State  
24 voluntarily makes Federal precedence binding. When a  
25 State does that, when a State voluntarily adopts

1 nonbinding Federal precedence, that creates no right  
2 under Federal law, which is what 1257 requires, and  
3 Michigan v. Long does not apply.

4 JUSTICE GINSBURG: So how would you describe  
5 the adequate and independent State ground on which  
6 the -- this decision rested?

7 MR. BERNSTEIN: I would say that the lack of  
8 a binding Federal law question is an antecedent  
9 requirement, to borrow the terminology of the S.G.'s  
10 brief, before you get to the adequate and independent  
11 State ground analysis.

12 JUSTICE SOTOMAYOR: So why don't we have  
13 jurisdiction to answer that question?

14 MR. BERNSTEIN: You certainly have  
15 jurisdiction to answer the question whether Teague is  
16 constitutionally required in State collateral review  
17 courts.

18 The second part of our brief said why it is  
19 not constitutionally required in State collateral review  
20 courts, and that's basically this Court's precedence  
21 from Danforth back to the beginning in Desist, and in  
22 Kaufman have said that the Teague -- what have become  
23 the Teague exceptions are matters of equitable  
24 discretion and not matters of the Constitution, and the  
25 Federal habeas statute on its face only applies in

1 Federal court.

2 So the Federal habeas court can grant relief  
3 if relief is warranted under the Teague exception.

4 JUSTICE KENNEDY: If a State says, we  
5 acknowledge that we are holding a prisoner in  
6 contravention of Federal law but we choose to do nothing  
7 about it, then the answer is Federal habeas corpus;  
8 there is not a second answer that the State can be  
9 required under the Supremacy Clause, under its own  
10 procedures, to enforce the Federal law?

11 And if -- if I'm -- and if I were to take --  
12 to argue that second position, I'm not quite sure what  
13 case I would have to support me. It wouldn't --

14 MR. BERNSTEIN: Well, I think that Your  
15 Honor's opinion for the Court in Martinez v. Ryan --

16 JUSTICE KENNEDY: Yeah.

17 MR. BERNSTEIN: -- in 132 Supreme Court at  
18 1319 to 1320, suggested that there are advantages to  
19 citing the Federal habeas right in the Federal habeas  
20 statute rather than what the Court called a freestanding  
21 constitutional claim. A major advantage here is if you  
22 say that the State courts are bound by the Teague  
23 exceptions by the Constitution, then when it goes to  
24 Federal habeas, there will be very deferential AEDPA  
25 review.

1           If you say that the redress question, as the  
2           rationale of Danforth indicated, in State court is a  
3           matter of State law, then when the issue goes to Federal  
4           habeas, AEDPA will not apply because the State court  
5           will not have decided the Federal issue. And that is --  
6           is a major difference. You would actually be weakening  
7           the Federal habeas statute to recognize jurisdiction in  
8           this case.

9           And this Court will benefit from having de  
10          novo percolation in the lower Federal courts, the lower  
11          habeas courts, all of which will be out the window if  
12          there's jurisdiction in this case, because the lower  
13          Federal habeas courts will only be able, and the courts  
14          reviewing them on appeal, to apply the highly  
15          differential AEDPA review.

16          JUSTICE KENNEDY:           In effect, are we saying  
17          that the Supremacy Clause binds the States only in  
18          direct criminal proceedings?

19          MR. BERNSTEIN:           No.

20          JUSTICE KENNEDY:           I mean, is that another  
21          way of phrasing your argument?

22          MR. BERNSTEIN:           It would be that the  
23          Supremacy Clause only binds the states in direct  
24          proceedings and in collateral proceedings where it's an  
25          old rule, because that's the equivalent of a direct

1 proceeding. But if you are talking about the  
2 retroactivity of a new rule, then the -- that's where  
3 the Teague -- the two Teague exceptions apply. They  
4 apply to new rules. They apply to collateral review.  
5 And those are based in statutory equitable discretion  
6 rather than the Constitution. But the Court has already  
7 held that both direct review and the application of old  
8 rules present Federal questions.

9 JUSTICE SOTOMAYOR: How do you differentiate  
10 this case from Standard Oil?

11 MR. BERNSTEIN: Because in Standard Oil, the  
12 issue was the underlying status of the Federal  
13 government arm, and the Court said that question is  
14 controlled by Federal law. Standard Oil is like Miller  
15 itself, where the issue was: What does the Eighth  
16 Amendment require. That's a Federal constitutional  
17 issue that was applied.

18 In Standard Oil, as a combination of statute  
19 regulations and Federal common law, Federal law  
20 controlled the question. Here the statute doesn't apply  
21 in State court, as Danforth and numerous other cases  
22 have held, like the Federal Rules of evidence don't  
23 apply in State court, even though many courts follow  
24 similar provisions and certainly follow Federal  
25 precedence in interpreting those similar rules.

1 JUSTICE SOTOMAYOR: But we did say that that  
2 State could define the exemption any which way it  
3 wanted.

4 MR. BERNSTEIN: Correct.

5 JUSTICE SOTOMAYOR: And so it could -- it's  
6 almost identical here; we would announce what the  
7 Federal law is, send it back. The State has already  
8 said it's going to follow Teague, but I guess it might  
9 or might not be free to change its mind about doing  
10 that.

11 MR. BERNSTEIN: I think the difference and  
12 what makes this case special is that this Court has held  
13 since *Murdock v. City of Memphis*, almost a hundred fifty  
14 years ago, 87 U.S. at 326 to 327, that the 1267  
15 jurisdiction is question by question. It is not like  
16 1331, case by case. It is question by question.

17 And I do not believe the Court has  
18 jurisdiction to skip over the question of whether  
19 Federal law applies and then answer the hypothetical if  
20 Federal law applied, what would it be. I think the  
21 question of whether Federal law applies is a  
22 jurisdiction.

23 JUSTICE BREYER: How -- how -- suppose --  
24 let's think of the first Teague exception. Suppose --  
25 substantive matters. Suppose that many states had



1 sedition laws, make certain conduct unlawful so there  
2 are a thousand people in prison. This Court in a new  
3 rule holds you cannot criminalize that behavior. All  
4 right. What is the law that would make that retroactive  
5 to people in prison? It sounds to me that it isn't like  
6 some kind of statutory discretion. Rather, there are  
7 human beings who are in prison, who are there without  
8 having violated any valid law, because it was always  
9 protected by the First Amendment.

10 And if that's right, then it's the  
11 Constitution, the due process clause, that says they are  
12 being held -- even though they committed the crime 22  
13 years ago, they are now being held in confinement  
14 without due process of law because you cannot  
15 criminalize their behavior.

16 MR. BERNSTEIN: Well --

17 JUSTICE BREYER: Do you see where I'm going?

18 MR. BERNSTEIN: Yes.

19 JUSTICE BREYER: That being so, it's a  
20 Federal Constitution rule, the exceptions of Teague,  
21 Teague drops out of the case. The only question is  
22 whether to satisfy the two exceptions.

23 MR. BERNSTEIN: Well, in your hypothetical,  
24 respectfully, I don't think that would be a new rule.  
25 It would be an old rule --

1 JUSTICE BREYER: I've made it a new rule.  
2 For purposes of my hypothetical, I'm making it a new  
3 rule.

4 MR. BERNSTEIN: If it were a genuinely new  
5 rule --

6 JUSTICE BREYER: Yeah.

7 MR. BERNSTEIN: -- then under Danforth and  
8 going all the way back. The -- justice Harlan's opinion  
9 in Mackey said, we're not creating the substantive  
10 exception because the Constitution requires that --

11 JUSTICE BREYER: Danforth was the case  
12 saying that the states could be more generous. It  
13 wasn't a case -- this is a case that's the opposite of  
14 being generous: Can they be more stingy. And I cannot  
15 find anything in -- in Harlan -- maybe I'll read it  
16 again, but I can't find anything there, nor can I find  
17 anything in Danforth that answers the question.

18 So I thought, it is a new question, hence,  
19 that question I posed to you because I wanted to get  
20 your response. I don't think you can answer it by means  
21 of precedent. I think you have to try to figure it out  
22 without the help of precedent.

23 MR. BERNSTEIN: Well, if it is a new rule,  
24 the Court has held -- and sorry to cite a precedent --  
25 Linkletter has held that retroactivity on collateral

1 review is not constitutional. That aspect --

2 JUSTICE BREYER: That's true. But then we  
3 have Teague, and Teague is saying we don't like  
4 Linkletter -- and -- and --

5 MR. BERNSTEIN: But Teague said, we don't  
6 like Linkletter.

7 JUSTICE BREYER: All right. But you're  
8 saying that we have -- then maybe that's wrong.

9 MR. BERNSTEIN: Because --

10 JUSTICE BREYER: I mean, why doesn't it  
11 violate the Constitution to hold a person in prison for  
12 20 years, for conduct which the Constitution forbids  
13 making criminal.

14 MR. BERNSTEIN: Well, it does violate the  
15 constitution.

16 JUSTICE SCALIA: It wasn't criminal at the  
17 time -- I mean, it wasn't prohibited by the Constitution  
18 at the time he was convicted, right?

19 MR. BERNSTEIN: Fair enough.

20 JUSTICE BREYER: That would be the reason.

21 MR. BERNSTEIN: Fair enough.

22 JUSTICE BREYER: That would be the reason.

23 MR. BERNSTEIN: Fair enough. But the -- the  
24 Constitution, according to the cases, is satisfied by  
25 the Federal habeas remedy. I think this is where

1 Schweiker --

2 JUSTICE BREYER: Is there anything else you  
3 can say? Because I can say, witch is being a witch.  
4 There were some people in Salem who were imprisoned for  
5 being a witch. And low and behold in 1820, it was held  
6 by this Court that that violated the Constitution.

7 Now, you see, I just make a more outrageous  
8 example of the same thing. And -- and what I want you  
9 to say, okay, I got your point. It didn't violate the  
10 constitution at the time. I've also got the point you  
11 have some authority.

12 Anything else?

13 MR. BERNSTEIN: This Court has been  
14 reluctant, even when there is a violation of the due  
15 process clause, to create a judicial remedy, an implied  
16 judicial remedy on top of the Federal statutory remedy.  
17 That's Schweiker v. Chilicky, cited in our briefs. And  
18 I think you should be especially reluctant --

19 JUSTICE KAGAN: That's not what is happening  
20 here, Mr. Bernstein. I mean, if you assume the premise  
21 of Justice Breyer's question, which is that there is a  
22 Constitutional violation for keeping somebody in prison  
23 for some conduct that can't be criminalized. The State  
24 has set up a collateral review mechanism. We're not  
25 asking it to set up a new mechanism that it hasn't had

1 before. It has a collateral review mechanism, and the  
2 only question is whether it's going to comply with  
3 Federal constitutional law in that collateral review  
4 mechanism.

5 MR. BERNSTEIN: And the other question is  
6 whether that issue of retroactivity is itself a Federal  
7 constitutional issue. If it is, obviously there's  
8 jurisdiction. If it is not, I would submit there is not  
9 jurisdiction, and that the proper remedy is Federal  
10 habeas.

11 If I may reserve the remainder of my time.  
12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
14 Mr. Plaisance.

15 ORAL ARGUMENT OF MARK D. PLAISANCE

16 ON BEHALF OF THE PETITIONER

17 MR. PLAISANCE: Mr. Chief Justice, and may  
18 it please the Court:

19 Miller v. Alabama established a new  
20 substantive rule prohibiting mandatory life without  
21 parole for juveniles, which should be applied  
22 retroactively.

23 This Court has jurisdiction to hear Henry  
24 Montgomery's claim because the Louisiana Supreme Court  
25 relied exclusively on Federal jurisprudence.

1           In Miller, this Court held that mandatory  
2 life in prison was unconstitutional. It also held that  
3 life in prison would be an uncommon, rare sentence, even  
4 today.

5           JUSTICE GINSBURG:           Isn't it just like a  
6 State saying, we have a Fourth Amendment, and the  
7 Federal Constitution has a Fourth Amendment. We are  
8 going to apply our own Constitution, but in applying it,  
9 we will follow the Federal precedent?

10           I think we would say, in that case, the case  
11 has been decided on the State constitutional ground,  
12 even though the State court, in interpreting that  
13 ground, is looking to Federal decisions.

14           MR. PLAISANCE:           In this case, Your Honor,  
15 the Louisiana Supreme Court did not State that it was  
16 exercising any independent grounds at all. Under  
17 Michigan v. Long.

18           JUSTICE SCALIA:           I thought that the -- the  
19 case it cited said that. I thought it cited an earlier  
20 Louisiana Supreme Court case which made it very clear  
21 that it was following the Federal rule as a matter of  
22 discretion and not because -- not because it had to, and  
23 it could in a later opinion decide not to follow Federal  
24 law.

25           MR. PLAISANCE:           It is my interpretation of

1 that earlier case that the Louisiana Supreme Court said,  
2 we have a choice, and they made the choice to apply  
3 Teague. In fact, they said in that opinion, we are  
4 dictated by the Teague analysis. And that's what was  
5 done in this case.

6 Under Michigan v. --

7 JUSTICE ALITO: Did they not say in Taylor  
8 that they were not bound to follow Teague? Didn't they  
9 say we're going to follow Teague but we want to make it  
10 clear we're not bound to do that?

11 MR. PLAISANCE: They did say that.

12 JUSTICE ALITO: They've never -- they've  
13 never retracted that have they.

14 MR. PLAISANCE: Correct, but the choice  
15 itself is not necessarily a matter of State law. While  
16 the Supreme Court had the authority to make that  
17 decision, it said, we believe, by choosing Teague, we  
18 believe that is the better law and, therefore, we will  
19 follow the Federal guidelines from Teague, the Federal  
20 jurisprudence in doing so.

21 And I believe that under Michigan v. Long,  
22 unless they state a clear and independent ground, this  
23 court can conclusively presume that they applied Federal  
24 law as they believed this court would apply.

25 JUSTICE SCALIA: I thought -- I thought it's

1 unless they clearly state otherwise, we will assume that  
2 they're applying Federal law. And here they did clearly  
3 state otherwise. They said, we don't have to follow  
4 Federal law, but we're going to model our State law on  
5 Federal law. It seems to me that satisfies the -- the  
6 exception requirement of -- of Michigan.

7 MR. PLAISANCE: It is my opinion that  
8 Michigan v. Long indicates the reverse, Your Honor, that  
9 the State must say, we are following State law in making  
10 this decision. We're applying State law rather than  
11 Federal law.

12 JUSTICE SCALIA: Well, they did say that  
13 here. They said that this is a matter of State law; we  
14 don't have to follow Teague, but we choose to as a  
15 matter of State law. I thought that's what they said.

16 MR. PLAISANCE: And I believe that that's  
17 sufficient to indicate to this Court that it is applying  
18 Federal law, it is not applying State law.

19 JUSTICE KAGAN: But Mr. Plaisance, I think  
20 what people are saying to you is that this is different  
21 from your standard Michigan v. Long question. It's a  
22 different question. It's a State that says we're not  
23 bound to follow Teague. We know we can do something  
24 different, but we want to follow Teague. That's what we  
25 want to do.



1           And then in all its particulars.           All right?

2   And then the question is:  If the State commits to  
3   following Teague, it's not -- it doesn't think anybody  
4   else has committed it.  It self commits to following  
5   Teague and to following Federal law.  Then what happens?  
6   Is there enough of a Federal question to decide this  
7   case?

8           Now, that's not a Michigan v. Long question.  
9   It's more like a Merrell Dow question or something like  
10   that where Federal law is -- the State has chosen it,  
11   but it's just part and parcel of the claim, because the  
12   State is so committed to following Federal law in all  
13   its particulars.

14           MR. PLAISANCE:           I agree with Your Honor.  
15   And even in Danforth this Court said that the question  
16   of retro activity is a pure question of Federal law.

17           CHIEF JUSTICE ROBERTS:           But I'm sorry, why  
18   don't you finish.

19           MR. PLAISANCE:           That's the answer to your --  
20   to your explanation or hypothetical, that you said if  
21   the State decided that they were choosing Federal law,  
22   then what?  What's the next step?  And the next step is  
23   the question is retroactivity, which both the majority  
24   and the descent in Danforth said the question of  
25   retroactivity is a pure question of Federal law.

1 CHIEF JUSTICE ROBERTS: Federal statutory  
2 law, right. I thought that was the point of Danforth,  
3 that the reason the States can go beyond what the  
4 Federal interpretation is is because we're talking about  
5 the Federal habeas statute. Right?

6 MR. PLAISANCE: That's correct, Your Honor,  
7 but even in Yates, this Court said that on State habeas,  
8 if the State considers the merits of the Federal claim.  
9 And the merits of this claim are: Is Mr. Montgomery  
10 serving an unconstitutional sentence? Is Miller  
11 retroactive to address the fact that he's serving an  
12 unconstitutional sentence?

13 JUSTICE GINSBURG: How do you deal with  
14 Mr. Baxter's point that your client would be worse off  
15 if -- if you are correct? That is, if the question  
16 comes up on Federal habeas, then the Federal court  
17 decide -- decides it without any AEDPA problem. But if  
18 the State court goes first, then the Federal review is  
19 truncated.

20 MR. PLAISANCE: That would be my  
21 understanding, Your Honor. That while Mr. -- while  
22 Henry -- while jurisdiction in this Court does not  
23 depend on what has occurred so far, it depends upon what  
24 this Court does decide. But again, whether he can go to  
25 Federal court or this Court doesn't affect this

1 jurisdiction that this Court, I believe, has today. And  
2 the question is: If --

3 JUSTICE GINSBURG: But in -- how do you  
4 answer the argument? All right? Suppose you're right,  
5 but your victory is going to leave your client in a  
6 worse position because when he gets to the Federal  
7 court, he will be saddled with AEDPA.

8 MR. PLAISANCE: Well, not if this Court  
9 rules that it has jurisdiction and makes Miller  
10 retroactive. Then obviously, at that point, he would  
11 not be going to Federal court. And the question is: Is  
12 Mr. Montgomery being held unconstitutionally? This  
13 Court in Miller said that a mandatory life-in-prison  
14 sentence is unconstitutional because it fails to address  
15 the fact of the matter that this Court believed kids are  
16 different.

17 JUSTICE SCALIA: Mr. Plaisance, on the  
18 jurisdictional point, let me see if I understand what  
19 you're arguing. A lot of State rules of procedure are  
20 modeled after Federal Rules of procedure, and a lot of  
21 State courts simply follow the Federal Rules. But they  
22 follow it as a matter of choice and not because they  
23 think they're bound by the Federal rules.

24 So let's say that there is a disagreement in  
25 Federal court about what Federal Rule of Evidence 403

1 means. The State court says, well, you know, we're  
2 going to follow the Federal rule, and we think that the  
3 right course as between these two divergent Federal  
4 courts of appeals is the Second Circuit. So we're going  
5 to follow the Second Circuit's interpretation of Federal  
6 rule 403. What -- would we have jurisdiction to review  
7 that decision as -- as a decision on a question of  
8 Federal law?

9 MR. PLAISANCE: If it was clear to this  
10 Court that the State court made a conscious choice and  
11 sent enough of a signal to this Court that it was  
12 adopting Federal law to use as State law. But in this  
13 case, there is no indication that the State of --  
14 Supreme Court of Louisiana was making that decision.  
15 They said that we are -- our analysis is dictated by  
16 Teague, and in doing so, they found that Mr. -- they  
17 would not apply Miller retroactive. That's the real  
18 issue of this case.

19 JUSTICE ALITO: Suppose we hold that we can  
20 review the -- the -- we have jurisdiction because the  
21 State court said it was going to follow Teague. And  
22 then we go on and we say that under Teague, Miller can  
23 be applied on collateral review. And then the case goes  
24 back to the Louisiana Supreme Court, and they said,  
25 well, we said previously in Taylor we were going to

1 follow Teague, but that was based on our understanding  
2 of Teague at that time. But now that we see what has  
3 been interpreted to mean by the U.S. Supreme Court,  
4 we're not going to follow Teague. Then what would  
5 happen?

6 MR. PLAISANCE: I think Louisiana would be  
7 bound to follow this Court's ruling as you set forth.

8 JUSTICE ALITO: It would be? Why? Because  
9 it said that we would voluntarily follow it in Taylor?  
10 That bound them?

11 MR. PLAISANCE: I think they made the  
12 conscious choice to follow this Court's laws, this  
13 Court's jurisprudence. In doing so, it must follow this  
14 Court's jurisprudence, as I've said before.

15 JUSTICE SCALIA: They changed their mind.  
16 They have now chosen the course not to follow our  
17 jurisprudence. What forces them to stay where they  
18 were? It's a matter of State law. They've decided  
19 we're going to change State law.

20 MR. PLAISANCE: But they didn't do that in  
21 this case, Your Honor. They didn't.

22 JUSTICE SCALIA: Well, not yet, but if we  
23 agree with you and then we send it back and they look at  
24 it and say, oh, if that's what Teague means, we're not  
25 going to follow Teague, what stops them from doing that?

1 And doesn't that make us look foolish?

2 MR. PLAISANCE: No, it doesn't, Your Honor.

3 JUSTICE SCALIA: We rule decisions that can  
4 be overruled by somebody else.

5 MR. PLAISANCE: If a State considers the  
6 merits of a Federal claim, it must grant the relief the  
7 Federal court --

8 JUSTICE SOTOMAYOR: You're not in.

9 JUSTICE KENNEDY: But the question is what's  
10 a Federal claim?

11 MR. PLAISANCE: The Federal claim.

12 JUSTICE KENNEDY: Why did you cite Standard  
13 Oil versus Johnson in response to your questions to  
14 Justice Scalia and Justice Alito?

15 MR. PLAISANCE: I believe my friend the  
16 general --

17 JUSTICE KENNEDY: Do I have --

18 MR. PLAISANCE: Perhaps.

19 JUSTICE KENNEDY: And the name in the case  
20 was Standard Oil v. Johnson.

21 MR. PLAISANCE: That was a case cited by the  
22 Solicitor General. I believe my friend from the  
23 Solicitor General's office can probably answer that  
24 question a little bit better.

25 The point I'd like to make --

1 JUSTICE SOTOMAYOR: Are you asking us to  
2 decide the question left -- left open in Danforth?

3 Danforth said that it was a minimum -- there  
4 could be a constitutional minimum, but it wasn't  
5 answering that question.

6 Are you asking us to answer that question?

7 MR. PLAISANCE: I'm saying, Your Honor, I  
8 don't believe you need to get to that question  
9 because --

10 JUSTICE SOTOMAYOR: But let's assume we --  
11 all right.

12 MR. PLAISANCE: Under Michigan v. Long this  
13 Court has jurisdiction.

14 I'll reserve the balance of my time.

15 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

16 MR. PLAISANCE: Thank you.

17 CHIEF JUSTICE ROBERTS: Mr. Dreeben.

18 ORAL ARGUMENT OF MICHAEL R. DREEBEN

19 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,  
20 SUPPORTING PETITIONER

21 MR. DREEBEN: Thank you, Mr. Chief Justice,  
22 and may it please the Court:

23 This Court does have jurisdiction to decide  
24 the question of Miller's retroactivity, because  
25 Louisiana has voluntarily incorporated into its law a

1 wholly Federal standard.

2 And in this Court's decisions in Standard  
3 Oil, Merrell Dow, Three Affiliated Tribes, and most  
4 recently Ohio v. Reiner, the Court has recognized that,  
5 when a State chooses to adopt Federal law to guide its  
6 decisions and binds itself to Federal law, there is a  
7 Federal question.

8 CHIEF JUSTICE ROBERTS: This might --

9 MR. DREEBEN: Does the United States --

10 CHIEF JUSTICE ROBERTS: They can change  
11 their mind; right? You said voluntarily chose to follow  
12 it.

13 MR. DREEBEN: That's right.

14 CHIEF JUSTICE ROBERTS: And they can  
15 voluntarily choose they're not going to follow it  
16 anymore.

17 MR. DREEBEN: That's right.

18 And the same is true is in any Michigan v.  
19 Long case. What Michigan v. Long said is that this  
20 Court has jurisdiction under Section 1257 to resolve  
21 State court resolutions of Federal law, and it will  
22 presume that a State constitutional decision of a mirror  
23 image, say of the Fourth Amendment, will be binding, but  
24 recognized that the only circumstance in which the Court  
25 will not treat Federal law as governing both questions



1 is when the State makes clear that it would reach the  
2 same result under State constitutional law as it did  
3 under Federal law.

4 It did not preclude the option of the State  
5 going back and reaching a different decision once  
6 enlightened by this Court as to the content of Federal  
7 law.

8 Standard Oil is completely clear on this.  
9 It says the State chose to use Federal law to determine  
10 whether a Federal post exchange was a Federal  
11 instrumentality. And we're going to correct its  
12 understanding of Federal law.

13 But on remand, the State can now, freed from  
14 its misapprehensions of Federal law, decide what it  
15 thinks State law requires. And if it does that, then  
16 there may be a Federal constitutional question.

17 JUSTICE BREYER: How does it work? It -- it  
18 should be pretty elementary, but -- I mean, I looked at  
19 the Indian case, and that seems a little far out.

20 The -- the -- the -- though it definitely  
21 gives you support on your statement here, suppose you  
22 took Justice Scalia's example: We have Iowa State Rule  
23 56. We interpret Iowa State Rule 56 the same way as the  
24 Federal Rules of Civil Procedure. That's our rule. And  
25 now this is what it means in that case. And they say,

1 "But we're doing it under Iowa State rule."

2 Now, you say we can review that because they  
3 said that Iowa State rule is the same as the Federal.

4 MR. DREEBEN: So I -- I --

5 JUSTICE BREYER: Is that right?

6 MR. DREEBEN: I --

7 JUSTICE BREYER: Now, I just -- how do you  
8 fit that in the words in 1257?

9 MR. DREEBEN: Well, I doubt -- I doubt that  
10 that would satisfy the Court.

11 And there's a theoretical answer, and then  
12 there's a practical answer. Let me give the practical  
13 answer first.

14 The states that copy the Federal Rules of  
15 Evidence and the Federal Rules of Civil --

16 JUSTICE BREYER: Yeah.

17 MR. DREEBEN: -- Procedure pretty uniformly  
18 say, we will treat Federal precedent as guidance in our  
19 decisions as -- for its persuasive value. They  
20 recognize that there are State rules of procedure and  
21 State rules of evidence that will belong to the State.

22 JUSTICE BREYER: Well, they say in a  
23 particular case, it's guidance. It's great guidance.  
24 We agree. Our interpretation is the Federal  
25 interpretation.

1 MR. DREEBEN: Well, I -- I think that --

2 JUSTICE BREYER: Now, can we review that  
3 because, in fact, it wasn't the Federal interpretation?  
4 But can we review it?

5 MR. DREEBEN: I -- I --

6 JUSTICE BREYER: Yes or no?

7 MR. DREEBEN: There -- there is a  
8 distinction between this case and that, that may suggest  
9 that this case the Court has jurisdiction over, and that  
10 one, the Court does not.

11 JUSTICE BREYER: So you say the Court does  
12 not, in the example of the Federal Rules of Civil  
13 Procedure that Justice Scalia gave?

14 MR. DREEBEN: I think this is a stronger  
15 case.

16 JUSTICE BREYER: Okay. It's a thought.

17 MR. DREEBEN: I'm doubtful that the Court  
18 would have jurisdiction or choose to exercise it,  
19 because -- I accept, for premises of the argument, Your  
20 Honor's hypothetical. But in the real world, it doesn't  
21 happen.

22 JUSTICE ALITO: Well, but when you say that  
23 that's a doubtful case, I think you are implicitly  
24 acknowledging that, if we adopt your argument, we are  
25 going to get that case and lots of similar cases, and

1 we're going to have to parse the words that were --  
2 were -- the words that were used by the State Supreme  
3 Court: Well, we're following -- we're going to be  
4 guided by it. We're going to be strongly guided by it.  
5 We're going to adopt it. We're going to get all of  
6 those cases.

7 Why should we go down that road --

8 MR. DREEBEN: Well, I think the Court --

9 JUSTICE ALITO: -- when there's a perfectly  
10 available and possibly superior remedy available to the  
11 petitioner by filing a Federal habeas petition?

12 MR. DREEBEN: So there are several reasons,  
13 Justice Alito.

14 First of all, I don't think that it is  
15 that -- going to come up in that way to this Court,  
16 because that's not the way States treat their own rules  
17 of procedure. I don't think it will be very difficult.

18 There is a principle in the Court's cases  
19 that, when Federal law has been adopted as Federal law,  
20 the Court will review it even if the State could have  
21 chosen a different path.

22 So --

23 JUSTICE SOTOMAYOR: Mr. Dreeben, what's the  
24 problem --

25 JUSTICE KENNEDY: Pardon me.

1           Did you misspeak?           When -- when Federal law  
2 is adopted as State law, the Federal courts can review  
3 it. Isn't that what you meant to say? Or -- or -- I  
4 mean, you're very -- you're very careful, and you don't  
5 make mistakes, but I --

6           MR. DREEBEN:           Well, I -- I think, Justice  
7 Kennedy --

8           JUSTICE KENNEDY:           You -- you said --

9           MR. DREEBEN:           This is -- this is what I'm  
10 trying to say --

11           JUSTICE KENNEDY:           -- when -- when State law  
12 adopts Federal law as Federal law, then there's review.  
13 Okay.

14           MR. DREEBEN:           The State has adopted Teague  
15 for a reason that does not exist in any of these civil  
16 procedure cases, and that is that the State knows that  
17 that Federal law will be applied to the very case in a  
18 habeas case. So the State has decided consciously to  
19 synchronize its law with the law that it knows will be  
20 applied.

21           And this actually serves a very important  
22 Federalism purpose. The State says, if we have to  
23 rectify in -- a constitutional error in our case that's  
24 become final, we would like the opportunity to do it.  
25 And if the Federal habeas Court is going to treat this

1 decision as retroactive, we would like the first crack  
2 at it.

3 California --

4 JUSTICE SCALIA: You're -- you're -- you're  
5 saying hurray that -- that the Federal habeas Court will  
6 thereafter be bound by it --

7 MR. DREEBEN: No, because --

8 JUSTICE SCALIA: -- because the State got  
9 there first.

10 MR. DREEBEN: No. There's an elementary  
11 reason why that's not so, Justice Scalia, and this  
12 answers Justice Ginsburg's question earlier.

13 2254(d) applies to State determinations on  
14 the merits. That's the only time that the deference  
15 provision kicks in.

16 And a determination under Teague is a  
17 threshold determination that comes before the decision  
18 on the merits. This Court has said that, in any number  
19 of cases, it's not a merits resolution of the case. So  
20 deference to a State determination on retroactivity  
21 would never occur.

22 What I --

23 JUSTICE SOTOMAYOR: Could you --

24 CHIEF JUSTICE ROBERTS: I was just going to  
25 suggest maybe we hear a little bit more on the merits.

1 MR. DREEBEN: Certainly, Mr. Chief Justice.

2 The -- the rule in *Miller v. Alabama*, in our  
3 view, is a substantive rule because it goes far beyond  
4 merely regulating the procedure by which youths are  
5 sentenced for homicide crimes. It compelled the State  
6 to adopt new substantive sentencing options, an option  
7 that is less severe than life without parole.

8 The only other time that this Court has ever  
9 invalidated a mandatory sentencing provision was  
10 *Woodson v. North Carolina* in 1976. So we went something  
11 like 36 years before we had another decision that  
12 concluded that the law must change to accommodate the  
13 compelling interests in having the characteristics of  
14 youth that mitigate culpability considered in the  
15 sentencing process.

16 CHIEF JUSTICE ROBERTS: Would it be  
17 enough -- is -- is it enough if the States simply say,  
18 okay. With respect to people who have been mandatorily  
19 sentenced to life without parole, we're going to provide  
20 parole?

21 MR. DREEBEN: Yes. I believe that it would  
22 be. That would be the same remedy that the Court  
23 ordered in a *Graham v. Florida* case for -- which is the  
24 case that held that youths who do not commit homicide  
25 but are convicted of other crimes cannot be sentenced to

1 life without parole at all.

2 And the Court's remedy for that problem  
3 could either be a sentence of term of years, but it  
4 could also be simply converting the life-without-parole  
5 sentence to a life-with-parole sentence.

6 So that would be --

7 JUSTICE SOTOMAYOR: Mr. Dreeben, how do you  
8 explain how your articulation of your test wouldn't  
9 apply to the guideline changes in Booker that we made?

10 MR. DREEBEN: So I -- I think, Justice  
11 Sotomayor, the key difference is that, with respect to  
12 the guidelines, there was always a -- a minimum and a  
13 maximum set by statute. And the guidelines, even when  
14 they were mandatory, did not preclude judges from  
15 sentencing outside the guidelines, depending upon the  
16 presence of aggravating or mitigating factors that  
17 weren't taken into account.

18 And as Justice Alito's opinion for the Court  
19 in United States v. Rodriguez recognized, even the top  
20 of a mandatory guidelines range was not truly mandatory.  
21 So even under the mandatory guidelines, which for Sixth  
22 Amendment purposes were treated as if they established  
23 elements of the offense, for the purposes that we're  
24 looking at here, they are not mandatory in the same way,  
25 so that Booker brought about a procedural change.



1           JUSTICE SOTOMAYOR:           What is the substantive  
2 difference -- pardon the use of that word -- between  
3 your formulation and Petitioner's formulation? He says,  
4 this is substantive because it did away with mandatory  
5 life imprisonment. You're articulating it slightly  
6 different. Tell me what you see as the difference and  
7 why your articulation.

8           MR. DREEBEN:           Justice Sotomayor, I don't  
9 think there is any substantive, to use the word,  
10 daylight between Petitioner's position and ours. The  
11 description of the crime at issue as punishable by  
12 mandatory life imprisonment and treating that as a  
13 category, I think, sums up the reality of what is  
14 happening. We broke it out into its component parts  
15 because I think it facilitates the analysis of it to  
16 understand that Miller does have a procedural component.

17           Sentencing courts must now consider the  
18 mitigating characteristics of age, but it also, and more  
19 fundamentally in our view, contains a substantive  
20 component that required a change in the law.

21           Now, the change here was expanding the range  
22 of outcomes. Previously when this Court has analyzed  
23 substantive changes in the law, there have been changes  
24 that restricted the form of outcome, say, for example,  
25 in Justice Breyer's hypothetical forbidding punishment

1 at all.

2 But I think that if you trace back the  
3 origins of the substantive category, to Justice Harlan's  
4 opinion in Mackey, this is still faithful to what  
5 Justice Harlan had in mind. Justice Harlan said, the  
6 clearest case of injustice in not applying a rule  
7 retroactively is when it puts off, limits altogether  
8 criminal punishment. He did not say that it was the  
9 only case.

10 And I think that if you consider what is  
11 going on in Miller and the reasons for the rule, the  
12 Court made very clear that it believed that of the 2,000  
13 people that were in prison and under mandatory life for  
14 juvenile homicide, the Court believed that that penalty  
15 was frequently disproportionate, that it would be  
16 uncommonly imposed in the future, and that it was not a  
17 sentence that was consistent in most cases with the  
18 mitigating characteristics of youth that have been  
19 recognized in Roper and in Graham and then in Miller.

20 JUSTICE ALITO: Would it be accurate to say  
21 that a rule is substantive if it makes a particular  
22 outcome less likely or much less likely or much, much  
23 less likely than was previously the case?

24 MR. DREEBEN: Probably the last, Justice  
25 Alito. When -- when the Court characterized substantive

1 rules most recently in the Summerlin opinion --

2 JUSTICE ALITO: The difference between much  
3 less likely and much, much less likely.

4 MR. DREEBEN: Well, I would put it in the  
5 words the Court has used previously. The Court has said  
6 that a substantive rule creates a significant risk that  
7 the person is serving a sentence that's not appropriate  
8 for that person, maybe not even legally available for  
9 that purpose. It did not say absolutely conclusively  
10 proves it. It says significant risk.

11 And in contrast, when the Court has talked  
12 about procedural rules, rules that govern the manner in  
13 which a case is adjudicated, it has said that the  
14 likelihood or potential for a different outcome is  
15 speculative.

16 And I think if you put this case on the  
17 speculative significant risk axis, this case falls in  
18 the significant risk domain precisely because of the  
19 reasons why the Court said it was deciding Miller.

20 The reasons why the Court decided Miller had  
21 to do with the reduced culpability of youth and the  
22 capacity of youth to mature, change, and achieve a  
23 degree of rehabilitation that is consistent with  
24 something less than the most harsh sentence available  
25 for youths who commit murder. A terrible crime, but

1 still the harshest sentence the Court thought would be  
2 reserved for the worst of the worst, which is, in fact,  
3 what Louisiana said when it amended its statutes  
4 substantively to conform them to Miller. It said life  
5 without parole should be reserved for the worst  
6 offenders who commit the worst crimes.

7 So when you combine the fact that this is  
8 not a rule that only governs procedure; it doesn't just  
9 govern evidence. It also mandates changes in outcomes  
10 as an available option with the very genesis of the  
11 Miller rule in a conclusion that, for the people in this  
12 class, the appropriateness of the punishment of the  
13 harshest degree, life without parole, will be relatively  
14 uncommon. It seems clear that the Miller rule falls on  
15 the substantive side of the axis rather than on the  
16 procedural side of the axis.

17 JUSTICE GINSBURG: And any States that have  
18 treated Miller as retroactive --

19 MR. DREEBEN: Yes.

20 JUSTICE GINSBURG: -- on State habeas.

21 MR. DREEBEN: Yes. The majority of States,  
22 it's a close call. I think it's maybe ten to seven or  
23 ten to eight. But the majority of States that have  
24 reviewed it have concluded that Miller is retroactive.  
25 Most of them have done it as a matter of substantive

1 law. There are a couple of opinions that talk about the  
2 watershed exception, which is not the way that we think  
3 that this case should be analyzed.

4 But not only the States have done that, but  
5 the United States has taken that position with respect  
6 to the juveniles that were sentenced before Miller to  
7 life without parole as a mandatory sentence. And in the  
8 resentencings of those that have taken place so far --  
9 it's only been about ten, but those -- those defendants  
10 have almost uniformly received sentences that are terms  
11 of years significantly shorter than the life.

12 JUSTICE GINSBURG: So what is the population  
13 we're dealing with if most States do apply Miller  
14 retroactively? I think there was a figure of 2,000  
15 people with life without parole.

16 MR. DREEBEN: I haven't broken it down  
17 numerically -- may I answer, Mr. Chief Justice?

18 CHIEF JUSTICE ROBERTS: Sure.

19 MR. DREEBEN: I have not broken it down  
20 numerically, Justice Ginsburg, but Michigan has not  
21 applied it retroactively, and it has a very large  
22 population of juveniles who are in the Miller class.  
23 And I don't think that Pennsylvania has resolved it,  
24 certainly not favorably yet for the defendants.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 MR. DREEBEN: Thank you.

2 CHIEF JUSTICE ROBERTS: Mr. Duncan.

3 ORAL ARGUMENT OF MR. S. KYLE DUNCAN

4 ON BEHALF OF THE RESPONDENT

5 MR. DUNCAN: Mr. Chief Justice, and may it  
6 please the Court:

7 I was going to begin by saying I would  
8 proceed directly to the merits, but I gather from the  
9 drifts of the argument that the Court has serious  
10 questions about jurisdiction, and so I'd like to briefly  
11 begin there.

12 We're in an odd position with respect to  
13 jurisdiction because we won below and we win in the  
14 Fifth Circuit on Federal habeas, which has found that  
15 Miller is not retroactive. Why then do we not contest  
16 jurisdiction?

17 We believe and still believe that this is a  
18 straightforward case. Not -- Justice Kagan, it's not a  
19 standard Michigan v. Long case, but it's an interwoven  
20 case, meaning that the -- the State court took Teague  
21 lock, stock, and barrel.

22 Now, there is no doubt, Justice Scalia, that  
23 in the Taylor -- in previous Louisiana Supreme Court  
24 opinions that the State said we are voluntarily adopting  
25 Teague. There is no doubt about that. So we think the

1 question is whether that raises the possibility of an  
2 advisory opinion from this Court. And why do we say it  
3 doesn't?

4 Well, because in cases like *Coleman v.*  
5 *Thompson and Hickman v. Oklahoma*, the Court said, "Where  
6 the Federal law holding is integral to the State court's  
7 disposition of the matter, there is no risk of an  
8 advisory opinion."

9 And later in *Coleman* the Court said, "Only  
10 if resolution of the Federal issue court could it not  
11 affect the judgment is it a risk of an advisory  
12 opinion."

13 So here we don't think there is a risk of an  
14 advisory opinion. Of course, it is within the realm of  
15 possibility. We doubt that it's going to happen, but it  
16 could happen that on remand the Louisiana Supreme Court  
17 could say, well, we have seen what you think about  
18 *Teague*. We're going to adopt our own retroactivity  
19 standards, as some States have done. They could do  
20 that. The question is: Does that make this Court's  
21 opinion advisory? And we think not.

22 The Solicitor General -- the Assistant  
23 Solicitor General has talked about cases like *Standard*  
24 *Oil v. Johnson* where the State was under no obligation  
25 to tether its State law to Federal standards.

1 JUSTICE SCALIA: It didn't say so, though.  
2 In -- in Standard Oil, the -- this is a quote from the  
3 opinion, "the relationship between post exchanges and  
4 the government of the United States is controlled by  
5 Federal law."

6 MR. DUNCAN: Right. That's right. My  
7 point, Justice Scalia, is that the -- that was embedded  
8 in a tax-exemption statute. The tax exemption made  
9 certain taxes exempt from the statute, and -- and the  
10 exemption --

11 JUSTICE SCALIA: Well, that would have been  
12 true no matter what the State did, right?

13 MR. DUNCAN: Well, no, the State --

14 JUSTICE SCALIA: We're deciding a question  
15 of Federal law that would have applied on its own.

16 MR. DUNCAN: Well, no -- well, with respect  
17 to Standard Oil, I think the -- my point is that the  
18 State didn't have to make its tax-exemption statutes  
19 turn on a Federal question. It did, and so the Court  
20 had jurisdiction to resolve it. That's all --

21 JUSTICE ALITO: Don't you think that the  
22 State made its tax-exemption law turn on Federal law  
23 because there are Federal constitutional requirements in  
24 that area? Could the State have taxed -- I mean, there  
25 was the question of whether or not the Supremacy Clause



1 would permit the State to tax sales to the post  
2 exchanges.

3 MR. DUNCAN: I think that's possible, but  
4 this court didn't make its jurisdiction dependent on  
5 that. So take a case like Ohio v. Reiner --

6 JUSTICE SCALIA: In the provision I just  
7 quoted, it said that the relationship between post  
8 exchanges and the United States is controlled by Federal  
9 law. That's what our opinion says.

10 MR. DUNCAN: Well, so take the -- the  
11 Assistant Solicitor General brought up the case of Ohio  
12 v. Reiner where State made its transaction on unity  
13 statute turn on the validity of a Fifth Amendment  
14 privilege. This Court -- this Court addressed that  
15 embedded and discrete Federal issue.

16 JUSTICE KAGAN: And Mr. Duncan, isn't it  
17 quite similar when Justice Scalia used this "controlled"  
18 language that the Louisiana Supreme Court has used  
19 similar language? It's dictated by Teague. Now, it's  
20 only dictated by Teague because they've chosen to make  
21 it dictated by Teague, but once that choice has been  
22 made, all outcomes are dictated by Teague. It's the  
23 same issue.

24 MR. DUNCAN: Well, we think -- we agree with  
25 that. We think it's binding -- quote/unquote, "binding"

1 within the meaning of binding Federal law, because the  
2 State has chosen to do it and it's never shown that it  
3 wouldn't do it. You know, so -- we -- we think that  
4 look, if the court disagrees with us on that --

5 JUSTICE ALITO: Well, in Ohio v. Reiner,  
6 which you just cited, was there any other way in which  
7 the State could have obtained review of the State  
8 supreme court's erroneous determination that the witness  
9 in question there did not have a Fifth Amendment  
10 privilege because she said that she didn't commit the  
11 crime?

12 MR. DUNCAN: I don't think so because  
13 this --

14 JUSTICE ALITO: And do you think that's not  
15 a distinction between that case and this case?

16 MR. DUNCAN: Well, if -- if the Teague -- if  
17 the Teague standard is a discrete Federal standard that  
18 the State has made -- has incorporated, then the only  
19 way -- well, the Louisiana Supreme Court could -- the  
20 defendant could go to Federal habeas, sure, and you  
21 could get an interpretation that way.

22 But it doesn't seem to us that the  
23 difference between Federal habeas and review of the  
24 State supreme court decision makes any difference with  
25 respect to this Court's jurisdiction. It might mean

1 that this Court would wait, you know, for -- for -- I  
2 don't know a more robust split to develop and take a  
3 Federal case that way.

4 But in this case -- and this goes to the  
5 second reason why we haven't strongly contested  
6 jurisdiction at all, because there is a robust split on  
7 this direct -- on this specific issue that extends to  
8 something like 21 State and Federal courts. They're all  
9 deciding the same Federal issue. So it seems to us that  
10 as a practical matter, this Court ought to weigh in.  
11 It's going to weigh in sooner or later either on a  
12 Federal habeas court or State court.

13 JUSTICE SCALIA: We weigh in when we have  
14 jurisdiction. You don't think that matters at all?

15 MR. DUNCAN: Of course it matters, Justice  
16 Scalia, of course it does.

17 JUSTICE SCALIA: What you said doesn't make  
18 much sense.

19 MR. DUNCAN: I think it makes sense.

20 JUSTICE SCALIA: Let's get in there quickly,  
21 whether we have jurisdiction or not. You're not saying  
22 that, are you?

23 MR. DUNCAN: We're not saying that. We're  
24 saying the Federal issue is generally interwoven with  
25 and State law and there's no independent State grounds,

1 then this Court has jurisdiction to decide the case.

2 Otherwise, wait for a Federal habeas case.

3 Proceeding to the merits. In Miller this

4 Court was invited --

5 JUSTICE BREYER: We clearly have  
6 jurisdiction, don't we? I'm trying to figure this out.

7 In my mind we have jurisdiction where there is a  
8 person -- that's the defendant -- and the defendant says  
9 the Court's decision -- that's your court's decision --  
10 is contrary to the Constitution or statute of the  
11 United States. That's just what they say.

12 MR. DUNCAN: That answers the question.

13 JUSTICE BREYER: So we have jurisdiction to  
14 answer the question.

15 Now, the question is how do we dispose of  
16 the case in which we have jurisdiction? And we have  
17 three cases, I guess, in which the Court has done in  
18 disposing of such a case what the Solicitor General  
19 says. Namely, they have said, we are -- we are not  
20 going to say whether he's right in saying it's contrary  
21 to the Constitution. That's because there might be an  
22 adequate State ground; there might not be. Their  
23 adequate State ground was one that was -- was elucidated  
24 or explained as being flowing from a certain  
25 interpretation of Federal law.

1 MR. DUNCAN: Well, that's --

2 JUSTICE BREYER: We will say their  
3 interpretation of Federal law was wrong, and now we'll  
4 send it back to see what they do. Is that right? Have  
5 I got it right?

6 MR. DUNCAN: That's our position. And by  
7 the way --

8 JUSTICE SCALIA: What is the Federal law  
9 you're talking about?

10 MR. DUNCAN: The application of Teague to  
11 Miller.

12 JUSTICE SCALIA: And Teague is an  
13 interpretation of that Federal law.

14 MR. DUNCAN: Well --

15 JUSTICE SCALIA: Was that Federal law at  
16 issue in this case?

17 MR. DUNCAN: The Teague -- the Teague  
18 standard --

19 JUSTICE SCALIA: Of course it wasn't.

20 JUSTICE BREYER: But the Teague standard --  
21 the Teague exceptions could well be constitutionally  
22 required. The Teague exception --

23 JUSTICE SCALIA: Have we ever said that?

24 MR. DUNCAN: You have not. And that's why  
25 we do not take a position on that. That's

1 particularly --

2 JUSTICE SCALIA: You want us to hold that in  
3 this case.

4 MR. DUNCAN: We do not want you to say that  
5 in this case.

6 CHIEF JUSTICE ROBERTS: Did we say that in  
7 Danforth?

8 MR. DUNCAN: You left the question open in  
9 Danforth.

10 JUSTICE SOTOMAYOR: Could you tell me why  
11 you would think that something like Atkins would not be  
12 retroactive to States?

13 MR. DUNCAN: Come --

14 JUSTICE SOTOMAYOR: As a compulsion, meaning  
15 not as by election of Teague retroactivity.

16 MR. DUNCAN: That is a difficult question  
17 that we don't take a position on.

18 But to answer your question, Justice  
19 Sotomayor, the -- the -- the argument goes that Danforth  
20 made clear that Teague is an -- is an equitable  
21 interpretation to Federal habeas statute, it's not  
22 constitutionally binding on the states, and that the  
23 Court left open whether the exceptions are binding, but  
24 the exceptions were part and parcel of Justice Harlan's  
25 Mackey understanding of -- of how he thought Federal

1 habeas ought to apply.

2 And so whereas -- whereas Atkins -- I mean,  
3 Atkins creates a binding constitutional right. The  
4 question of remedy, though. The question of the State  
5 constitutionally bound to offer that remedy. And this  
6 Court has recognized, in cases like Pennsylvania v.  
7 Finley, for example, that States have wide discretion in  
8 structuring their post conviction.

9 And the -- the next point, though, has to do  
10 with Finality.

11 JUSTICE SOTOMAYOR: It has to do something  
12 different because, as Justice Breyer pointed out, you  
13 have wide discretion to structure it as you want. But  
14 if you structured it in a way that you're going to say  
15 "I'm offering due process," isn't there a check, a  
16 substantive check by due process --

17 MR. DUNCAN: Well --

18 JUSTICE SOTOMAYOR: -- that you have to  
19 offer the minimum?

20 MR. DUNCAN: Well, I mean, that is -- that  
21 is the question. So this Court has found that there's a  
22 substantive check on due process in Griffith where we're  
23 talking about direct review.

24 When we're talking about collateral  
25 review -- I mean, our view, although we haven't taken a

1 position on it, collateral review is a different animal  
2 for purposes of --

3 JUSTICE SOTOMAYOR: But we have any number  
4 of cases where States have viewed the exceptions as  
5 controlling the fact that they have to offer the  
6 constitutional minimum.

7 MR. DUNCAN: But this Court has never held  
8 that.

9 JUSTICE SOTOMAYOR: Hasn't yet.

10 MR. DUNCAN: Unless --

11 JUSTICE SOTOMAYOR: And why shouldn't we?

12 MR. DUNCAN: I understand.

13 JUSTICE SOTOMAYOR: That's really the  
14 serious question.

15 MR. DUNCAN: It -- it -- it is a serious  
16 question. We -- we -- and, again, we have not taken a  
17 position on that question because we feel that this case  
18 is interwoven of Federal law as a matter of State  
19 retroactivity.

20 In Miller this -- on to the merits: In  
21 Miller this Court was invited to categorically bar the  
22 penalty of life without parole for juveniles who commit  
23 murder, but it decided not to do so.

24 Now, that decision leads directly to the  
25 conclusion, in our view, that Miller is not a



1 substantive rule under Teague's first exception.  
2 Consideration of the Teague framework, Teague policies,  
3 and Teague precedent points instead to the conclusion  
4 that Miller is a procedural and not a substantive rule.

5 So we think Summerlin most helpfully sets  
6 out the framework that ought to govern this question.

7 JUSTICE KAGAN: Mr. Duncan --

8 MR. DUNCAN: Yes.

9 JUSTICE KAGAN: -- can I give you just a  
10 hypothetical? I mean --

11 MR. DUNCAN: Sure.

12 JUSTICE KAGAN: -- suppose that there is a  
13 State and it has a -- a mandatory minimum for a theft.  
14 It says the mandatory minimum for theft is 20 years.

15 And suppose a court looks at that and says,  
16 you know what? That's incredibly disproportionate to a  
17 lot of theft, and so strikes the mandatory minimum.  
18 Says, you just can't have a mandatory minimum like that.  
19 Make it lower.

20 Would that be a substantive ruling?

21 MR. DUNCAN: We don't think so, Justice  
22 Kagan, because the mandatory aspect of it goes to the  
23 manner of imposing a penalty.

24 JUSTICE KAGAN: It does not go to the manner  
25 of imposing. It says nothing about the manner of

1 imposing.

2           What it does is it just increases the range  
3 of sentencing possibilities. It actually leaves it to  
4 the -- to the courts. It says absolutely nothing about  
5 what factors ought to be taken into account. Nothing  
6 about that at all.

7           All it says is, you can't have a mandatory  
8 minimum of 20 years for theft. Make it lower.

9           MR. DUNCAN:           Well, so in -- in -- if in that  
10 hypothetical that doesn't go to the manner of imposing  
11 the penalty, then it's different than Miller because  
12 Miller made very clear that the mandatory aspect of the  
13 penalty goes to the manner of imposing the penalty --

14           JUSTICE KAGAN:           But I think --

15           MR. DUNCAN:           -- not any substance.

16           JUSTICE KAGAN:           So if you're saying, no,  
17 that's different because there was something else in  
18 Miller. There is something else in Miller. There is a  
19 bunch. There -- there is -- there is a process  
20 component of Miller, no question about it, where the  
21 Court says what courts are supposed to look at is -- are  
22 the characteristics of youth and are supposed to try to  
23 figure out whether these terrible crimes are functions,  
24 in part, of immaturity or -- or -- or not, whether  
25 you -- you really are looking at an incorrigible

1 defendant.

2           So there is that process component.           But  
3 that process component does not take away the fact that  
4 there is a completely separate, self-sufficient  
5 component as to what the range of punishment has to be.  
6 That's completely on all fours with the hypothetical  
7 that I gave you.

8           MR. DUNCAN:           Well, your -- Justice Kagan,  
9 the -- the relevant difference in terms of the Teague  
10 analysis is that this Court in Miller did not take the  
11 punishment of life without parole, the distinction  
12 category of punishment of life without parole off the  
13 table. This Court has never held that a noncategorical  
14 rule is substantive under Teague.

15           And it's done that for good reasons:  
16 Because that would fly in the face of the policies that  
17 inform the Teague analysis.

18           JUSTICE KAGAN:           No, you're exactly right.  
19 It did not take LWOP punishment off the table. But,  
20 similarly, in my hypothetical a 20-year sentence for  
21 theft has not been taken off the table.

22           What the Court has done is to say, there  
23 have to be other options. There has to be an option of  
24 ten years or five years or two years -- whatever it is.

25           So they've expanded the range of

1 possibilities. They've just made the sentences  
2 different because the sentence is defined both by its  
3 upper end and by its lower end.

4 MR. DUNCAN: I under --

5 JUSTICE KAGAN: So they made the sentence  
6 different.

7 MR. DUNCAN: I understand that. But making  
8 the sentence different doesn't necessarily mean it make  
9 it substantive under the Teague framework.

10 Here's another way of looking at it: The  
11 defendant in a -- a juvenile murderer who committed --  
12 who committed murder and is serving a  
13 life-without-parole sentence today, pre-Miller, is not  
14 facing a punishment that the law cannot impose on him.  
15 And we know that from Miller because Miller said the  
16 Court's decision does not preclude that punishment.

17 And so that goes to Finality. The Finality  
18 interests underlying convictions do not yield where the  
19 State still has the power to impose that punishment.  
20 Finality interests yield -- Justice Harlan explained in  
21 Mackey and this Court adopted in Teague, Finality  
22 interests yield only where the State lacks the power.  
23 That's where the Finality interests crumble, so to  
24 speak, because the State no longer can impose that  
25 category of penalty.

1           So that would go for Roper.           It would go for  
2   Graham. It would go for Justice Breyer's sedition or  
3   witch crimes.

4           If -- if -- if somebody's in jail because  
5   they were accused of being a witch, then the State has  
6   no Finality interest in keeping that person in jail.  
7   But by the same token, if -- if -- if the punishment is  
8   death for a juvenile, the State has no Finality  
9   interests in doing that.

10          So leaving the punishment on the table is  
11   crucial. If he doesn't take it off, it's not  
12   substantive.

13          The second policy reason for Teague is  
14   avoiding the adverse consequences of retrial. And we  
15   think Miller is even more clearly not substantive under  
16   that standard because categorical rules apply  
17   retroactively, as Justice Harlan explained, because they  
18   don't carry the adverse consequences of retrial. They  
19   don't make you go back and redo the trial and unearth  
20   old facts and -- and drain State resources and come up  
21   with a distorted -- distorted retrials.

22          Miller, by its nature, envisioned a  
23   fact-intensive hearing that considers multiple  
24   characteristics at the time of the crime.

25          JUSTICE KENNEDY:           But you don't have a

1 distorted new trial if you're just granted parole  
2 hearing.

3 MR. DUNCAN: That's right. That -- that's  
4 right. But that's, of course, not what Miller would  
5 require. That's what Graham would require, Justice  
6 Kennedy, because Graham is obviously a categorical rule  
7 that says you can no longer impose that punishment so  
8 you have to give them a parole hearing or some  
9 meaningful way of release.

10 Miller is about the step before whether to  
11 give a parole hearing. Whether the person can be  
12 eligible for parole at the outset. That's the inquiry  
13 that we're talking about in Miller, and that's quite  
14 different from a parole hearing.

15 The fact of the matter is, though, is that  
16 applying Miller retroactively inevitably turns the  
17 Miller -- the retroactive Miller hearing into a parole  
18 hearing which -- which shows that it doesn't quite work  
19 in terms of adverse --

20 JUSTICE BREYER: You were going to say -- at  
21 some point you started: Suppose you look at the  
22 watershed procedural change. My -- my impression from  
23 the case you cited, Summerlin, is that deciding whether  
24 that's retroactive has to you parts.

25 I think we were unanimous on this point.

1 The two parts were: Is it implicit in the concept of  
2 ordered liberty? And here it would seem to be because  
3 it's applicable to the States. And the second is, is it  
4 central to an accurate determination that life without  
5 parole is a legally appropriate punishment? And the --  
6 the -- the rule that mandatory can't exist is central to  
7 making that -- that was the whole point of the Miller  
8 opinion.

9 So if that's the correct analysis for  
10 watershed rule, procedural rule that's retroactive -- if  
11 I'm accurate about that, why doesn't it fit within that  
12 category?

13 MR. DUNCAN: Well, let's take the first one,  
14 the point: It's not just implicit in the concept of  
15 ordered liberty. The way that the -- the watershed rule  
16 has been stated and the first, the first prong of it is  
17 it has to alter our understanding of bedrock procedural  
18 elements necessary to fundamental fairness.

19 And this would be a strange case to find  
20 that in because Miller itself doesn't represent a  
21 bedrock revolution in sentencing practices. It takes a  
22 sentencing practice from another area and puts it in  
23 this new area.

24 So it's an incremental change in that sense.  
25 It's not a wholesale discovery of a new bedrock

1 procedural element the way we had in -- in a case like  
2 Gideon v. Wainwright.

3 So -- and -- and I think this Court  
4 explained in Whorton v. Bockting that it's not enough  
5 that the rule be fundamental in some -- in some abstract  
6 sense. Right? But it has to itself represent a change  
7 in bedrock procedural understandings.

8 And we don't think Miller does that.

9 We also don't think it's necessary to an  
10 accurate determination of a sentence. It would enhance  
11 the accuracy of a sentence, but it's not necessary.

12 And the other point there is this Court has  
13 never hold that a -- held that a pure sentencing rule  
14 can qualify under watershed because, after all, this  
15 Court has, on many occasions, said that a watershed rule  
16 is necessary to the accurate determination of guilt or  
17 innocence, and here we're talking about a sentence.

18 So we -- we agree with the United States  
19 that watershed procedural analysis is not the way to go  
20 here, but it does raise an interesting question.

21 In Summerlin -- because, after all, we do --  
22 we do part company quite strongly from the United States  
23 when -- when the United States says we need an  
24 outcome-expanding alteration to the definition of  
25 substantive rules under Teague. We say that's -- that's



1 not just a slight tweak to Teague. What that is is a  
2 change in the understanding of what a substantive rule  
3 is. Substantive rules under Teague analysis have never  
4 depended on the frequency with which new outcomes  
5 might -- might come about under the new procedures.

6 In fact, in Summerlin -- and this goes back  
7 to my original point about the framework. Summerlin  
8 explained that a criminal defendant under a procedural  
9 rule does have the opportunity of getting a more lenient  
10 outcome under the new procedures. So -- and  
11 nonetheless, Summerlin said that such procedural rules  
12 are not applied retroactively.

13 And so, as -- Justice Alito, as you were  
14 saying, the difference between a substantive and a  
15 procedural rule under Teague is not whether it's very  
16 likely or very, very likely to result in a new outcome.  
17 It's about whether the new rule categorically removes  
18 the power of the State to impose a category of  
19 punishment. That's what a -- that's what a categorical  
20 rule does. That is not what Miller does.

21 Right? Miller may express an expectation  
22 about the way that Miller hearings will come out. And  
23 that may or may not come -- come to pass in the future.  
24 Who knows; right? We can point to cases where criminal  
25 defendants have had Miller hearings and have still

1 received life without parole. And I can point to  
2 several in particular from the State of Louisiana under  
3 its new Miller procedures.

4 But the point being is that the idea of  
5 changing outcomes, which is what the United States'  
6 entire argument depends on, is built into the procedural  
7 side of Teague and not the substantive side. The  
8 substantive side is about --

9 JUSTICE KAGAN: Mr. Duncan, I -- I -- I  
10 think not. I think by your own definition this fits on  
11 the substantive side. You said you -- you categorically  
12 remove a certain outcome.

13 And -- and -- and that's exactly what Miller  
14 does. If you -- as long as you understand a sentence,  
15 which I think you agreed with, as defined both by its  
16 upper and -- and by its lower end, effectively what the  
17 Court said in Miller was that that sentence, which was  
18 the mandatory LWOP sentence, cannot control for  
19 juveniles.

20 MR. DUNCAN: And --

21 JUSTICE KAGAN: There has to be a different  
22 sentence. One that includes other punishments.

23 MR. DUNCAN: Well, there's no doubt --

24 JUSTICE KAGAN: That -- that increases the  
25 range.

1 MR. DUNCAN: Right.

2 Miller -- Miller quite clearly said, as you  
3 know, Justice Kagan, that it does not categorically bar  
4 a penalty but -- and -- and so -- and what did it mean  
5 by that penalty? It's --

6 JUSTICE KAGAN: It allows something within  
7 the range, but it has -- it has completely changed the  
8 range that's -- that is -- that is given for any  
9 juvenile defendant.

10 MR. DUNCAN: Well, we think that's --

11 JUSTICE KAGAN: And the range is important.  
12 It's not just the top end. This is what we said in  
13 Alleyne, that you can't think about a sentence without  
14 thinking about both parts of the sentence, both the  
15 maximum and the minimum. And when you decide whether a  
16 substantive change in that sentence has been made, you  
17 look at both: the maximum and the minimum.

18 MR. DUNCAN: Well, I -- look, I -- I -- I -- I  
19 hope this is responsive. I mean, I think after Miller  
20 we would see two categories of punishment on the table.  
21 We would see a life-without-parole category and a  
22 life-with-parole, for example.

23 But my point is is that Miller doesn't ban  
24 the first category, and that is determinative for  
25 whether something is a substantive rule or not.

1 JUSTICE SCALIA: I'm -- I would -- I would  
2 not describe changing the range of sentences available  
3 as changing the sentence.

4 MR. DUNCAN: It -- it puts element on the  
5 table, I think, is the most you could say.

6 JUSTICE SCALIA: It doesn't change the  
7 sentence --

8 MR. DUNCAN: Yes.

9 JUSTICE SCALIA: -- necessarily.

10 MR. DUNCAN: Right.

11 JUSTICE KAGAN: But this is what we --

12 JUSTICE SCALIA: You still get the same  
13 sentence.

14 MR. DUNCAN: You could still -- absolutely  
15 still.

16 And what -- what did you --

17 JUSTICE KAGAN: Which is what we said last  
18 year. We said, it's possible to disassociate the floor  
19 of a sentencing range from the penalty affixed to the  
20 crime. And similarly we said, criminal statutes have  
21 long specified both the floor and ceiling of sentencing  
22 ranges, which is evidence that both define the legally  
23 prescribed penalty.

24 MR. DUNCAN: Well --

25 JUSTICE KAGAN: That is the penalty.

1 MR. DUNCAN: Right.

2 JUSTICE KAGAN: Is the range.

3 MR. DUNCAN: It -- it -- life without parole  
4 has the same floor and ceiling, of course. It's --  
5 it's -- it's got the same floor and ceiling. What  
6 Miller does is create the -- the -- the procedural  
7 circumstances for finding -- for putting a new penalty  
8 on the table, which is the -- the -- that's the point of  
9 the United States' argument: There is a new  
10 possibility.

11 And our point is to say that putting a new  
12 possibility on the table doesn't take away the State's  
13 power to impose the old category of punishment.

14 JUSTICE SOTOMAYOR: Mr. Winsor --  
15 Mr. Winsor --

16 MR. DUNCAN: Duncan. I'm sorry.

17 JUSTICE SOTOMAYOR: -- I know that we didn't  
18 ever look at this issue.

19 I'm sorry. Reading the wrong one. I  
20 apologize.

21 But do you really think that we -- that any  
22 State would have not applied Woodson retroactively?

23 MR. DUNCAN: That -- that --

24 JUSTICE SOTOMAYOR: They all did.

25 MR. DUNCAN: Probably -- probably not, Your

1 Honor. But the -- the question -- that -- that, of  
2 course, is a pre-Teague case. It raises the question:  
3 Is Woodson substantive or procedural under Teague? And  
4 our argument is it's a procedural rule.

5 JUSTICE SOTOMAYOR: Why?

6 MR. DUNCAN: It's a procedural rule --

7 JUSTICE SOTOMAYOR: It just said you  
8 couldn't have mandatory death penalties. Just like  
9 here, you can't have mandatory life without parole.

10 MR. DUNCAN: Right. It required an  
11 individualized sentencing --

12 JUSTICE SOTOMAYOR: It says this exactly --

13 MR. DUNCAN: -- process which we say is  
14 procedure.

15 JUSTICE SOTOMAYOR: And to give sentences  
16 less than --

17 MR. DUNCAN: It -- it would put new --

18 JUSTICE SOTOMAYOR: -- mandatory death. But  
19 they could have still given death.

20 MR. DUNCAN: They certainly could have, so  
21 the question is whether it's substantive or procedural  
22 under the Teague rubric, which, of course, it was a  
23 pre-Teague case. I think the most we can say about it  
24 is it's not substantive under Teague for the reasons  
25 that we have said.

1           Now raise the question is it a watershed  
2 procedural rule? Perhaps that's --

3           JUSTICE BREYER:           All right. But that's the  
4 language -- bedrock is, I don't think it is the right  
5 language, because that was the language he referred to  
6 in a sentences in Mackey, correct. I've just been  
7 looking it up.

8           And -- and but then in Teague itself,  
9 Justice O'Connor tries to get the right words, and --  
10 which he ends up with here is that, the procedural is  
11 the first test, first part, is -- can be addressed by  
12 limiting the scope of the second exception -- that's the  
13 Watershed rule -- to those new procedures without which  
14 the likelihood of an accurate conviction is seriously  
15 diminished. Okay.

16           MR. DUNCAN:           That's the first one.

17           JUSTICE BREYER:           And that's joined by the  
18 Chief Justice, Justice Scalia, and the fourth, I can't  
19 remember.

20           But so is it seriously diminished?           Now, we  
21 read through Miller, it's pretty hard to say. I mean,  
22 my goodness, Miller is just filled with paragraph after  
23 paragraph about how a mandatory requirement for life  
24 without parole fails to take account of all the  
25 characteristics or many characteristics adherent in

1 youth.

2 And it's pretty hard to come away from that  
3 without thinking, Gee, accuracy under a mandatory life  
4 without parole does seriously diminish the accuracy of  
5 imposing life without parole when you apply the  
6 mandatory to a youth.

7 MR. DUNCAN: But in every Eighth Amendment  
8 sentencing rule goes to accuracy in some significant --

9 JUSTICE BREYER: No, no. But you have to  
10 say the accuracy is seriously diminished. And she says,  
11 Then I don't think there will be too many such cases.

12 MR. DUNCAN: Well, again, take -- we haven't  
13 talked about the capital sentencing cases, but take a  
14 case like O'Dell where the capital jury was not informed  
15 of the defendant's parole and eligibility while  
16 considering its future dangerousness. I mean, one could  
17 easily say that the accuracy of the resulting death  
18 sentence under the old rule was seriously diminished,  
19 and yet this Court said in O'Dell that that is not a  
20 watershed procedural rule. And you go down the line  
21 with those cases, the Beard case, and the Sawyer case.  
22 Those are cases in which the defendant could have said,  
23 Well, seriously diminished accuracy. And yet the Court  
24 found no watershed rule. And, of course, the bedrock is  
25 what the word that this Court has used in referring to



1 that exception particularly in *Whorton v. Bockting*.

2 JUSTICE GINSBURG: Is there any watershed  
3 procedural rule other than *Gideon*?

4 MR. DUNCAN: Well, this Court said, it's  
5 doubtful that any will emerge. So we think this case is  
6 an implausible case for a new watershed rule to emerge  
7 since this rule -- and back to the bedrock point -- it's  
8 not a creating a -- it's not -- it's not a revolution in  
9 bedrock under standing of procedure. It's -- it's an  
10 incremental step in sentencing juveniles. So if a case  
11 like *Crawford* is not a watershed procedural rule, then  
12 it's difficult to understand how this one would be.

13 JUSTICE GINSBURG: We have one brief that  
14 tells us this Court has never barred punishment as cruel  
15 unusual under the Eighth Amendment, but refused to make  
16 a the decision retroactive.

17 MR. DUNCAN: Well, we disagree with that.  
18 There are cases -- take the -- take the case that  
19 refused to make retroactive the rule in *Caldwell v.*  
20 *Mississippi*. That's an Eighth Amendment case that goes  
21 to the accuracy of a capital jury sentence in  
22 determination of death. And this Court didn't make that  
23 rule retroactive and found that it was procedural and  
24 non-watershed at the same time. So we take issue with  
25 that.

1           Just a few more words about the  
2 United States proposed expansion of Teague. It would --  
3 it would shift the whole focus of what a substantive  
4 rule is from the categorical nature of the rule to the  
5 effects of the rule. And so that -- if any defendant in  
6 these capital sentencing cases we've just been talking  
7 about, O'Dell and Sawyer and Beard, would now have the  
8 argument handed to them by the United States new rule  
9 that says, Well, that new rule gave me the opportunity  
10 for a better outcome. I might have not gotten the death  
11 penalty if my jury had been properly instructed.

12           We don't understand how the United States  
13 new rule in this case can be cabined only to where a  
14 mandatory sentence is taken off the table.

15           JUSTICE KAGAN:           Well, but I think that you,  
16 yourself, cabined it when you said that the difference  
17 is one -- there is some category of cases that do refer  
18 to process, to how a decisionmaker makes a particular  
19 result, and another category of cases which refer to  
20 what we've called substance, which is what results are  
21 on the table, what category of punishment is on the  
22 table. And that's the difference between this and all  
23 the other kinds of things that you're mentioning.

24           MR. DUNCAN:           Well, I --

25           JUSTICE KAGAN:           This is not about the how --

1 or it's partly about the how, but there's also about  
2 what punishments are on the table.

3 MR. DUNCAN: Well, I just have to push back  
4 on the premise a little bit, where -- our position is  
5 not that a substantive rule is about what punishments  
6 are on the table. A substantive rule is about whether a  
7 State categorically no longer has the power to impose a  
8 category of punishment. Here it's clear from the Miller  
9 opinion and from the Grayer -- from the Graham opinion  
10 that the relevant category is life without parole. The  
11 State still has the ability to impose that punishment,  
12 and that's what -- that's a sharp distinction from what  
13 a procedural rule is. And the United States' new  
14 conception of what a substantive rule is would blur  
15 that -- would blur that.

16 And it would call into question all of the  
17 capital sentencing cases -- and I heard a question -- I  
18 don't remember which justice asked it -- about Booker.  
19 And my reaction to that is, but Booker as a matter of  
20 the Sixth Amendment made a sentencing underline  
21 mandatory, and it surely opened up new sentencing  
22 outcomes.

23 And so by what reason could a Federal habeas  
24 petitioner now not say under the United States' new test  
25 Booker is now retroactive, or a Alleyne for that matter.

1 Alleyne overturned the mandatory minimum under the Sixth  
2 Amendment, opening up new sentencing outcomes. Why  
3 couldn't a Federal defendant on Federal habeas say, Now  
4 I ought to get the benefit of that rule retroactively?

5 Our position is those cases, Booker,  
6 Alleyne, Apprendi are clearly procedural, as this Court  
7 explained in -- in Summerlin -- Sierra v. Summerlin.  
8 They're clearly procedural under the Teague rubric. And  
9 what the United States would do is blur those  
10 categories.

11 If there are no further questions.

12 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

13 Mr. Bernstein, you have three minutes  
14 remaining.

15 REBUTTAL ARGUMENT OF RICHARD D. BERNSTEIN

16 ON BEHALF OF THE COURT-APPOINTED AMICUS CURIAE

17 MR. BERNSTEIN: What this fantastic  
18 discussion has shown is why the Court, as it always has  
19 in the past, should keep the Teague exceptions a matter  
20 of equitable discretion, rather than constitutional  
21 requirement. The Court has much more freedom, generally  
22 speaking, on the matter of equitable discretion than it  
23 does on constitutional requirements. There is no way to  
24 look at the prior precedents of the Court in Teague in  
25 any of those courts to say, oh, here's what our

1 equitable discretion is. The only time you get  
2 retroactivity is when the Constitution requires it.  
3 That would have been a really short opinion. And that  
4 was not that.

5 Now, to turn quickly to the cases that have  
6 been cited. The critical difference between this case  
7 on the one hand and Merrill Dow and three affiliated  
8 tribes on the other hand is that jurisdiction under this  
9 statute is question by question under Murdock. In  
10 Merrill Dow, the question of whether the defendant's  
11 conduct had violated the Federal drug labeling laws was  
12 a Federal question.

13 The Court never would have gone on to say,  
14 and we're also going to federalize the remedy. We're  
15 going to decide whether it's lost profits or  
16 out-of-pocket costs.

17 Similarly, in three affiliated tribes, there  
18 was no question that there was a Federal statute that  
19 limited State court jurisdiction. The only issue was  
20 the scope of that statute.

21 Here we have the opposite. There is no  
22 question that the Federal statute does not apply to the  
23 State court, and yet people say you should decide the  
24 scope question even though the underlying issue may be  
25 one of State law.

1           And then, finally, to this list of General's  
2 new cake-and-eat-it-too argument that is going to be  
3 reviewed in this Court and de novo review on habeas, the  
4 statutory language in 2254 D is pretty broad. It,  
5 quote, "Any claim that was adjudicate indicated on the  
6 merits in State court proceeding."

7           The only claim in this case is remedy.           This  
8 case was filed after Miller was decided. The only issue  
9 in this case is redress. And it would be very wonderful  
10 turn if you could say on the one hand that 2254 D  
11 doesn't apply but on the other hand 2757 applies when it  
12 re -- when it requires a, quote, "right claimed under  
13 Federal law," which gets to your question, Justice  
14 Kagan.

15           Is it enough that a State court says, we  
16 voluntarily want to be bound? And the best answer to  
17 that is, not only in the cases I would recommend, Moore,  
18 which is cited in Merrill Dow, which goes out of its way  
19 to show how Federal law is binding on the intrastate  
20 commerce conduct in that case before saying the Court  
21 could review it, but it's also plain in the language of  
22 the Supremacy Clause. Binding Federal law means binding  
23 in all 50 states, and that's why the statute also says  
24 right under Federal law.

25           Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

2 And, Mr. Plaisance, you have three minutes  
3 remaining.

4 MR. PLAISANCE: Your Honors, I'd like to  
5 make two quick points.

6 First of all, in jurisdiction. Resolving  
7 this case under Teague avoids the serious constitutional  
8 question of whether due process requires retroactivity  
9 activity for Miller.

10 A second point on the merits. Miller said  
11 that juvenile homicide offenders should not have to die  
12 in prison with no chance for rehabilitation and no  
13 consideration of youth. That important rule changed the  
14 substantive outcomes available. Indeed, this Court said  
15 that life without prison should be uncommon.

16 The individual sentence before Miller that  
17 remains about 1500 deserve a chance at redemption.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

20 Mr. Bernstein, the court appointed you as an  
21 amicus curiae to brief and argue this case against this  
22 Court's jurisdiction. You have ably discharged that  
23 responsibility, for which the Court is grateful. The  
24 case is submitted.

25 (Whereupon, at 11:18 a.m., the case in the

1 above-entitled matter was submitted.)  
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